

Maurer School of Law: Indiana University
Digital Repository @ Maurer Law

Indiana Law Journal

Volume 56 | Issue 3

Article 4

Spring 1981

The Case for Quick Relief: Use of Section 10(j) of the Labor-Management Relations Act in Discriminatory Discharge Cases

Randal L. Gainer

Indiana University School of Law

Follow this and additional works at: <http://www.repository.law.indiana.edu/ilj>

 Part of the [Labor and Employment Law Commons](#)

Recommended Citation

Gainer, Randal L. (1981) "The Case for Quick Relief: Use of Section 10(j) of the Labor-Management Relations Act in Discriminatory Discharge Cases," *Indiana Law Journal*: Vol. 56 : Iss. 3 , Article 4.

Available at: <http://www.repository.law.indiana.edu/ilj/vol56/iss3/4>

This Note is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

NOTES

The Case for Quick Relief: Use of Section 10(j) of the Labor-Management Relations Act in Discriminatory Discharge Cases

To reduce the frustration of remedies¹ caused by administrative delays,² the National Labor Relations Board's (NLRB) use of injunctions authorized by section 10(j) of the Labor-Management Relations Act (LMRA)³ has significantly increased in recent years.⁴ Section 10(j) authorizes the Board to petition a federal district court for temporary

¹ The Supreme Court has recognized that labor law violations must be remedied quickly if the relief is to be effective. See *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 430 (1967). See also Note, *The Role of the Temporary Injunction in Reforming Labor Law Administration*, 8 COLUM. J. L. & SOC. PROB. 553, 558 (1972).

² Routine National Labor Relations Board processing of unfair labor practice charges involves a number of separate steps: First, the alleged victim of the violation files a charge with the regional office of the Board. Then, the office investigates the charge and, if it is found to be meritorious, the office issues a complaint. Next, a hearing is held at which the charging party and the complainant present arguments to an administrative law judge who then issues a written decision. If either party takes exception to the judge's decision, the Board reviews the decision and issues an opinion and order. Finally, if the violator fails to comply with the order, the Board must petition a federal court of appeals for an enforcement order; failure to comply with the court order results in a contempt citation. See Nolan & Lehr, *Improving NLRB Unfair Labor Practice Procedures*, 57 TEX. L. REV. 47, 48-50 (1979).

In fiscal year 1979, the median time elapsed from the filing of a charge to a Board decision was 385 days. *Id.* at 50. If the case finds its way to the court of appeals, another year may elapse before enforcement. See *id.* at 51.

³ 29 U.S.C. § 160(j) (1976). The statute states:

The Board shall have power, upon issuance of a complaint . . . charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court . . . shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

Id.

⁴ From 1975 to 1979, the Board authorized an average of 48 petitions for § 10(j) relief per year. Irving, *Use of Section 10(j) Injunction Proceedings*, 4 LAB. L. REP. (CCH) ¶ 9209, at 15,942 (1979). From 1948 through 1961, there was an average of approximately three authorizations under § 10(j) per year and from 1962 through 1975 the average was approximately 16. Comment, *Section 10(j) of the National Labor Relations Act: A Legislative, Administrative and Judicial Look at a Potentially Effective (But Seldom Used) Remedy*, 18 SANTA CLARA L. REV. 1021, 1027 n.29 (1978).

injunctive relief after an unfair labor practice complaint has been issued, and gives the court jurisdiction to grant the Board "such temporary relief . . . as it deems just and proper."⁵ Greater use of section 10(j) is a step long urged by legal commentators,⁶ congressional committees responsible for overseeing the Board's administration of national labor laws⁷ and union spokesmen.⁸

While section 10(j) has provided timely and effective enforcement remedies in those cases where it has been invoked by the NLRB and enforced by the courts,⁹ it has not been utilized in many other cases which also merit such action.¹⁰ The legislative history of section 10(j) reveals that it was meant to provide temporary injunctive relief in every case that could not be effectively remedied through the NLRB's lengthy adjudicatory procedures.¹¹ Reinstatement of a wrongfully discharged employee, the remedy generally ordered by the Board when an unlawful discharge has been found,¹² is a meaningless remedy if it is not ordered

⁵ 29 U.S.C. § 160 (1976). This affirmative grant of jurisdiction was necessary since in 1932 Congress, by means of the Norris-LaGuardia Act, *id.* §§ 101-115, had for all practical purposes, eliminated the use of labor injunctions by federal courts. *See generally* F. FRANKFURTER & N. GREENE, *THE LABOR INJUNCTION* (1930) (detailing the history of abuses of labor injunctions which led to the passage of the Norris-LaGuardia Act).

⁶ *See, e.g.,* Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 130-31 (1964); Siegel, *Section 10(j) of the National Labor Relations Act: Suggested Reforms for an Expanded Use*, 13 B.C. INDUS. COM. L. REV. 457, 482 (1972); Note, *supra* note 1, at 570; Note, *Temporary Injunctions Under Section 10(j) of the Taft-Hartley Act*, 44 N.Y.U. L. REV. 181, 196 (1969).

⁷ Investigatory committees that have recommended increased use of § 10(j) include the "Pucinski Subcommittee" SUBCOMM. ON NATIONAL LABOR RELATIONS BOARD OF THE HOUSE COMM. ON EDUCATION AND LABOR 87TH CONG., 1ST SESS., REPORT ON ADMINISTRATION OF THE LABOR-MANAGEMENT RELATIONS ACT BY THE NLRB 52 (Comm. Print 1961) [hereinafter cited as PUCINSKI REPORT]. The "Cox Panel Report" recommended an amendment to the NLRA to make § 10(j) injunctions mandatory in some circumstances. *See* ADVISORY PANEL ON LABOR-MANAGEMENT RELATIONS LAW, SENATE COMM. ON LABOR AND PUBLIC WELFARE, REPORT ON ORGANIZATION AND PROCEDURE OF THE NATIONAL LABOR RELATIONS BOARD, S. DOC. NO. 81, 86th Cong., 2d Sess. 12, 26 (1960) [hereinafter cited as COX PANEL REPORT]. The most recent congressional recommendation for increased use of § 10(j) came from the House of Representatives when it passed overwhelmingly the Labor Reform Act (LRA), H.R. 8410, 95th Cong., 1st Sess. (1977). 123 CONG. REC. H32,613 (daily ed. 1977). The LRA contained a provision requiring the NLRB to seek § 10(j) injunctions forcing employers to reinstate employees fired without just cause during organizing campaigns. LRA § 9. After a five week filibuster in the Senate, the LRA was recommitted to committee. 124 CONG. REC. S9412 (daily ed. June 22, 1978).

⁸ *See, e.g.,* HOUSE COMM. ON EDUCATION AND LABOR, 95TH CONG., 1ST SESS., HEARINGS ON H.R. 8410, 258, 258-59 (Comm. Print 1977) (statement of Douglas Fraser); SUBCOMM. ON NATIONAL LABOR RELATIONS BOARD OF THE HOUSE COMM. ON EDUC. AND LAB., 94TH CONG., 1ST SESS., 563, 570 (Comm. Print 1975) (statement of Victor Van Bourg).

⁹ *See, e.g.,* Taylor v. Circo Resorts, Inc., 458 F. Supp. 152 (D. Nev. 1978) (§ 8(a)(3) charge filed Aug. 17, 1978; § 10(j) injunction issued Oct. 11, 1978).

¹⁰ *See* notes 63-67 & accompanying text *infra*.

¹¹ *See* notes 18-48 & accompanying text *infra*.

¹² *See generally* D. McDOWELL & K. HUHN, *NLRB REMEDIES FOR UNFAIR LABOR PRACTICES* 103-21 (1976).

promptly.¹³ Nevertheless, the procedures the Board has developed for gleaning discriminatory discharge cases which merit section 10(j) action¹⁴ from its huge unfair practice caseload¹⁵ have resulted in arbitrary selection of certain section 8(a)(3)¹⁶ unfair labor practice cases, while other equally deserving cases are ignored.¹⁷ The courts have compounded this problem by adopting inappropriate and overly restrictive standards to determine when section 10(j) relief is "just and proper." Thus, many unlawful discharge complaints which could be remedied with timely injunctive relief are allowed to proceed slowly through the Board's routine procedures, and injunctive relief is denied by the courts in some cases where the relief should be granted.

This note argues that the legislature intended for section 10(j) to give the NLRB the discretion to seek temporary injunctions against unfair labor practices whenever it determined that the delay caused by its own procedures would prevent a violation from being effectively remedied; thus, the Board has abused its section 10(j) discretion by failing to consider most discriminatory discharge cases for possible section 10(j) action. This note then analyzes judicial criteria used to determine if section 10(j) injunctions should be issued and argues that most of these standards contradict the legislative purpose of the section as well as settled principles for hearing administrative agency petitions for statutorily authorized injunctive relief.

¹³ Empirical studies have demonstrated that unless reinstatement of a wrongfully discharged employee is ordered within a short time after his discharge he probably never will regain the status of a permanent employee. See, e.g., Stephens & Chaney, *A Study of the Reinstatement Remedy Under the National Labor Relations Act*, 25 LAB. L.J. 31 (1974); accord, *Amendments to Expedite the Remedies of the National Labor Relations Act: Hearings on H.R. 7152 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 1st Sess. 265, 265-73 (1971) [hereinafter cited as *Hearings on H.R. 7152*] (statement of Rep. Les Aspin). One study in Board Region 1, New England, showed that although 85% of a group of 194 persons who had been discriminated against initially requested reinstatement, only 85 eventually were reinstated and 60 of those left after two years due to employer harassment. *Id.* at 266-67. Similar results were found in Region 16, Northern Texas: Of 217 persons discriminated against, 70 were eventually reinstated and 60 left within two years because of unfair company treatment. See Stephens & Chaney, *supra*, 33-36. Both of these studies recommended increased use of § 10(j). See *Hearings on H.R. 7152, supra*, at 272 (statement of Rep. Les Aspin); Stephens & Chaney, *supra* at 40.

¹⁴ See notes 69-72 & accompanying text *infra*.

¹⁵ The Board processed 39,652 unfair labor practice cases in fiscal year 1978. 43 NLRB ANN. REP. 1 (1978). Only 11,357 such cases were processed in 1960. Nolan & Lehr, *supra* note 2, at 50. This increase led one member of the Board to observe: "There can be no doubt that the Board's surging caseload seriously threatens its ability to discharge its statutory responsibilities." Penello, *The NLRB's Misplaced Priorities*, 30 LAB. L.J. 3, 3 (1979).

¹⁶ Section 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3) (1976), states in relevant part: "It shall be an unfair labor practice for an employer—by discrimination in regard to hire or tenure of employment or any term or condition of employment—to encourage or discourage membership in any labor organization." *Id.*

¹⁷ See notes 63-67 & accompanying text *infra*.

THE CONGRESSIONAL INTENT UNDERLYING SECTION 10(j)

Section 10(j) originated in the Senate version of the LMRA¹⁸ and only the Senate Report on the Senate bill discusses section 10(j) explicitly.¹⁹ The lack of explicit reference to the section in the legislative history of the Taft-Hartley Act²⁰ beyond that in the Senate Report has been interpreted as an indication that the Taft-Hartley Congress did not intend to encourage the Board to utilize the discretionary authority to seek temporary injunctions that was authorized by section 10(j).²¹ Those who support this interpretation reason that if Congress had intended to reverse the then prevailing policy against the use of temporary injunctions in labor disputes,²² there would be a clear indication of that intent in the

¹⁸ S. 1126, 80th Cong., 1st Sess. 32 (1947), reprinted in SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947, at 130 (1974) [hereinafter cited as LMRA LEGISLATIVE HISTORY].

There was no section comparable to § 10(j) in the House bill. See H.R. 3020, 80th Cong., 1st Sess. (1947), reprinted in LMRA LEGISLATIVE HISTORY, *supra*, at 31. The section was accepted by the House members of the conference committee and was recommended without comment to the House. See H.R. CONFERENCE REP. NO. 510, 80th Cong., 1st Sess. 57 (1947), reprinted in LMRA LEGISLATIVE HISTORY, *supra*, at 561.

¹⁹ Experience under the National Labor Relations Act has demonstrated that by reason of lengthy hearings and litigation enforcing its orders, the Board has not been able in some instances to correct unfair labor practices until after substantial injury has been done. Under the present act the Board is empowered to seek interim relief only after it has filed in the appropriate circuit court of appeals its order and the record on which it is based. Since the Board's orders are not self-enforcing, it has sometimes been possible for persons violating the act to accomplish their unlawful objective before being placed under any legal restraint and thereby to make it impossible or not feasible to restore or preserve the status quo pending litigation.

In subsections (j) and (l) to section 10 the Board is given additional authority to seek injunctive relief. By section 10(j), the Board is authorized, after it has issued a complaint alleging the commission of unfair labor practices by either an employer or a labor organization or its agent, to petition the appropriate district court for temporary relief or restraining order. Thus the Board need not wait, if the circumstances call for such relief, until it has held a hearing, issued its order, and petitioned for enforcement of its order.

S. REP. NO. 105, 80th Cong., 1st Sess. 27 (1947), reprinted in LMRA LEGISLATIVE HISTORY, *supra* note 18, at 433.

²⁰ See Labor Management Relations (Taft-Hartley) Act 29 U.S.C. §§ 141-187 (1976).

²¹ NLRB General Counsel Denham stated in 1947:

I find it difficult to believe that Congress intended that injunctive relief would be invoked as a preliminary cease and desist order every time a labor organization is charged with an unfair labor practice. The history of labor injunction is too long and reveals too much the national desire to reduce government by injunction to a minimum to justify any theory other than that this provision is placed in the Act for emergency purposes and only where loss or damage or jeopardy to the safety and welfare of a large segment of the public would result if injunctive action were not taken.

I. ROTHENBERG, LABOR RELATIONS 632 n.4 (1949).

²² That policy was codified in the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1976); see note 5 *supra*.

legislative history of the LMRA. The Board at one time subscribed to this reasoning and sought few temporary injunctions²³ except in the circumstances covered by section 10(l) of the LMRA,²⁴ which requires that petitions for temporary injunctions be filed against unions when they engage in secondary boycotts and jurisdictional disputes.²⁵

The legislative purpose of section 10(j) cannot be adequately understood by reviewing only the explicit references to that section in the legislative history of the LMRA.²⁶ These references must also be read in the context of the other relevant provisions of the LMRA and the debates and maneuverings which led to the passage of section 10(j).²⁷

Enactment of Section 10(j)

The LMRA was enacted in reaction to the increased industrial strife that followed World War II,²⁸ by a Republican legislature determined to end what the congressional majority considered abuses of power by organized labor.²⁹ The majority believed that the National Labor Relations Act (NLRA)³⁰ unduly favored unions and disadvantaged management; the LMRA was intended to eliminate this imbalance in the national labor laws.³¹ Sections 10(j) and 10 (l) were intended to effect a com-

²³ See Comment, *supra* note 4, at 1032-34.

²⁴ 29 U.S.C. § 160(l) (1976).

²⁵ See *id.* Section 10(l) also requires the NLRB to investigate charges alleging a jurisdictional strike or secondary boycott before it investigates any other charges which may be pending. *Id.* Priority investigation and mandatory injunctions have led to § 10(l) being utilized in thousands of union unfair labor practice cases since 1947. W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 697 (6th ed. 1974). Only 11 of the 47 petitions filed under § 10(j) between 1947 and 1962 were filed against employers. Note, *supra* note 1, at 564 n.97.

²⁶ Cf. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 284-85 (1977) (plurality opinion) (analyzing legislative history of § 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976): "[I]solated statements of various legislators . . . must be read against the background of both the problem Congress was addressing and the broader view of the statute that emerges from a full examination of the legislative debates.").

²⁷ See *United Steelworkers v. Weber*, 443 U.S. 193, 201 (1979) (discussing § 703(a) & (d) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) & (d) (1976)); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 350-53 (1977) (discussing § 703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(h) (1976)).

²⁸ The need for congressional action has become particularly acute as a result of increased industrial strife. In 1945, this occasioned the loss of approximately 38,000,000 man-days of labor through strikes. This total was trebled in 1946 when there were 116,000,000 man-days lost and the number of strikes reached the unprecedented figure of 4,985.

S. REP. NO. 105, *supra* note 19, at 2, reprinted in LMRA LEGISLATIVE HISTORY, *supra* note 18, at 408.

²⁹ See generally Mann, *Taft-Hartley and the 80th Congress*, in H. MILLIS & E. BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 363, 363-92 (1950).

³⁰ Wagner Act, ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-169 (1976)).

³¹ [T]he administration of the National Labor Relations Act itself has tended to destroy the equality of bargaining power necessary to maintain industrial

promise between the anti-union congressional majority and organized labor's defenders in Congress, who were clearly a minority.³² The majority wanted to suspend the anti-injunction provisions of the Norris-LaGuardia Act³³ by restoring to employers the right to petition courts for temporary injunctions against secondary boycotts and jurisdictional disputes.³⁴ The minority, on the other hand, fearing a return to "government by injunction,"³⁵ sought to retain the Board's exclusive jurisdiction to remedy all unfair labor practices.³⁶ After extensive Senate debate,³⁷ and after an amendment was offered by Senator Taft,³⁸ the Senate spon-

peace. This is due in part to the one-sided character of the act itself, which, while affording relief to employees and labor organizations for certain undesirable practices on the part of management, denies to management any redress for equally undesirable actions on the part of labor organizations.

S. REP. NO. 105, *supra* note 19, at 2, *reprinted in* LMRA LEGISLATIVE HISTORY, *supra* note 18, at 408.

³² See H.R. MINORITY REP. NO. 245, 80th Cong., 1st Sess. 110 (1947), *reprinted in* LMRA LEGISLATIVE HISTORY, *supra* note 18, at 401; S. MINORITY REP. NO. 105 (pt. 2) 80th Cong., 1st Sess. 18-19, (1947), *reprinted in* LMRA LEGISLATIVE HISTORY, *supra* note 18, at 480-81.

³³ Ch. 90, 47 Stat. 70 (1932) (current version at 29 U.S.C. §§ 101-115 (1976)).

³⁴ The House bill offered nothing comparable to § 10(j), *see* note 18 *supra*, rather, it contained sections which would have suspended the Norris-LaGuardia Act by allowing employers to seek injunctions as private litigants against union unfair labor practices, *see* H.R. 3020, 80th Cong., 1st Sess. § 12(4)(b)-(c) (1947), *reprinted in* LMRA LEGISLATIVE HISTORY *supra* note 18, at 206-07. A number of senators, led by Senator Ball of Minnesota, sought to amend the Senate bill to allow employers to seek injunctions in secondary boycotts and jurisdictional strikes. *See* 93 CONG. REC. 4887 (1947), *reprinted in* LMRA LEGISLATIVE HISTORY, *supra* note 18, at 1323-24. *See generally* Mann, *supra* note 29, at 491.

³⁵ This phrase was first given currency by a conservative leader of the English bar who opposed the use of broadly worded injunctions in labor disputes. *See* Dunbar, *Government by Injunction*, 13 LAW Q. REV. 347 (1897). *See generally* F. FRANKFURTER & N. GREENE, *supra* note 5, at 86-133.

³⁶ Abuses of labor injunctions prior to the Norris-LaGuardia Act were often cited by opponents of the Ball Amendment. *See generally* 93 CONG. REC. 4887-5048 (1947), *reprinted in* LMRA LEGISLATIVE HISTORY, *supra* note 18, at 1323-69.

³⁷ *See* 93 CONG. REC. 4887-5045 (1947), *reprinted in* LMRA LEGISLATIVE HISTORY, *supra* note 18, at 1323-65. Typical of the debate is the following exchange between Senator Morse, a proponent of S. 1126, 80th Cong. 1st Sess. (1947), *reprinted in* LMRA LEGISLATIVE HISTORY, *supra* note 18, at 130, including §§ 10(j) and 10(l), and Senator Ellender, a proponent of the Ball Amendment:

[MR. MORSE:] Does the Senator agree with me that we must make clear to the Senate that the choice which must be made is whether we are going to try to do this by an administrative approach, or by way of a so-called court approach?

MR. ELLENDER: That seems to present the whole issue . . .

. . . The only argument I heard against the provision which is contained in the pending bill was that the other proposal would provide a quicker process; that under it an employer could go into court today and obtain an injunction tomorrow and stop the threatened action.

93 CONG. REC. 4256 (1947), *reprinted in* LMRA LEGISLATIVE HISTORY, *supra* note 18, at 1057-58. The administrative "approach" referred to by Senator Morse was, of course, the remedying of unfair labor practices by the NLRB, while the "court approach" was the use of judicial injunctions obtained by private litigants.

³⁸ *See* 93 CONG. REC. 4887 (1974), *reprinted in* LMRA LEGISLATIVE HISTORY, *supra* note 18, at 1346. The Taft Amendment was later adopted. *See* 93 CONG. REC. 5049 (1947), *reprinted in* LMRA LEGISLATIVE HISTORY, *supra* note 18, at 1370.

sor of the LMRA, a compromise was reached which resulted in the adoption of the relatively balanced approach embodied in sections 10(j) and 10(l).³⁹ The Board retained exclusive jurisdiction to remedy all unfair labor practices, but the majority's determination to eliminate secondary boycotts and jurisdictional disputes was manifested in section 10(l)'s requirements that the Board give investigative priority to employers' complaints alleging such union unfair labor practices and that it seek an injunction against the union if a complaint is issued.⁴⁰ Employers were thus protected against secondary boycotts and jurisdictional disputes during the interval that the Board processed the underlying unfair labor practice complaint. The Taft Amendment further placated the majority by allowing employers to recover treble damages from unions for any losses caused by secondary boycotts or jurisdictional strikes.⁴¹

In this context, the discretionary authority given to the Board under section 10(j) to seek temporary injunctions against any other unfair labor practices by unions or employers appears to have been an attempt to conform the injunctive provisions of the LMRA, at least superficially, to the Act's objective of making the federal labor laws fair to both labor and management.⁴² Although the significance of this compromise is not entirely clear,⁴³ it would be wrong to read the legislative history of the LMRA as indicating a congressional intent to retain unabridged the policy against the use of injunctions as a means of resolving labor disputes.⁴⁴ The Taft-Hartley Congress clearly favored the increased use of injunctions against certain *union* unfair labor practices, and it was forced by the dynamics of the legislative process⁴⁵ to accede to the

³⁹ 29 U.S.C. § 160(j), (l) (1976).

⁴⁰ *Id.* § 160(l).

⁴¹ Ch. 120, Title III, § 303, 61 Stat. 158 (1947) (current version at 29 U.S.C. § 187 (1976)).

⁴² It would have been a transparent contradiction of Congress' intent "to equalize legal responsibilities of labor organizations and employers," S. REP. NO. 105, *supra* note 19, at 1, reprinted in LMRA LEGISLATIVE HISTORY, *supra* note 18, at 407, to prescribe unequal remedial procedures for union and management. Hence, Congress inserted the language stating that § 10(j) was available to the Board to stop unfair labor practices by "either an employer or a labor organization," S. REP. NO. 105, *supra* note 19, at 27, reprinted in LMRA LEGISLATIVE HISTORY, *supra* note 18, at 433.

⁴³ It is arguable that since the congressional majority was concerned with eliminating union unfair labor practices, § 10(j) should not be read as an encouragement for the Board to seek injunctive relief against employers. Yet the ability of the minority to force a concession from the majority must also be given some consideration in attempting to discern the purpose of § 10(j). Where such conflicting motivations of individual legislators or groups of legislators prevail, the formal reports of the houses provide a useful and generally reliable basis from which to interpret their collective intent. See F. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 158 (1975). Thus the Senate report's statement that § 10(j) is available against both employers and unions may resolve the question of the Senate's intent. The House can be presumed to have concurred in this intent since it was silent on this issue. See notes 18-19 & accompanying text *supra*.

⁴⁴ Cf. *McCleod v. General Elec. Co.*, 366 F.2d 847, 849 (2d Cir. 1966) (§ 10(j) did not change federal labor law policy disfavoring use of injunctions in labor disputes), *vacated & remanded*, 385 U.S. 533 (1967).

⁴⁵ See notes 28-42 & accompanying text *supra*.

demands of the prolabor minority that only the Board be given the authority to petition for temporary injunctions and that the Board be allowed to seek injunctions against *employer* unfair labor practices if it were to be required to seek them against unfair union practices.⁴⁶ Ultimately, then, in accordance with the process by which most labor legislation in this country typically is passed,⁴⁷ Congress left the effect to be given section 10(j) to the discretion of the Board.⁴⁸

NLRB PRACTICE IN SECTION 10(j) CASES

Though the Board was initially reluctant to seek section 10(j) injunctions,⁴⁹ this reluctance was eroded somewhat in the early 1960's when a sharp increase in its caseload⁵⁰ coincided with encouragement from congressional oversight committees to increase its use of the section.⁵¹ Since 1976, when an advocate of increased section 10(j) use was appointed NLRB General Counsel,⁵² petitions have been filed with increasing frequency.⁵³

⁴⁶ "By section 10(j), the Board is authorized, after it has issued a complaint alleging the commission of unfair labor practices *by either an employer or a labor organization or its agent*, to petition the appropriate district court for temporary relief or restraining order." S. REP. NO. 105, *supra* note 19, at 27, *reprinted in* LMRA LEGISLATIVE HISTORY, *supra* note 18, at 433 (emphasis added).

⁴⁷ [S]tatutes are necessarily flexible and vague, and this is particularly likely in the United States where the process of enacting labor legislation is such a heated and partisan affair. In this atmosphere, Congress is especially prone to avoid troublesome conflicts by resorting to vague phrases or employing terminology so loosely drafted as to require the Board to indulge in freewheeling methods of interpretation.

Note, *supra* note 1, at 556 n.25 (quoting Derek C. Bok).

⁴⁸ For an explanation of congressional deferral to administrative expertise, see H. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES* 11-14 (1962).

⁴⁹ See note 4 *supra*.

⁵⁰ There were five years of steady increase in case intake, climbing from 13,356 in 1958 to 24,848 cases in 1962. 27 NLRB ANN. REP. 5 (1962).

⁵¹ See note 7 *supra*.

⁵² John Irving, appointed in December, 1976, believed that S. REP. NO. 105, *supra* note 19 "succinctly set forth" the purpose of both § 10(j) and § 10(l). Irving, *Remedies and Compliance—Putting More Teeth into the Act*, in PROCEEDINGS OF THE TWENTY-THIRD ANNUAL INSTITUTE OF LABOR LAW 349, 357-58 (Southwestern Legal Foundation 1977). Besides increasing the number of § 10(j) authorizations, Irving streamlined the manner in which regional attorney's requests for § 10(j) authorization were processed by the General Counsel and the Board. *Id.* at 360. The authorization for a regional Board office to file a § 10(j) petition must be obtained from the Board's General Counsel in Washington, who must then obtain Board approval for the action. The procedure followed by the Board in § 10(j) cases is described in NLRB CASE HANDLING MANUAL (CCH) ¶ 3102 (1979) [hereinafter cited as CASE HANDLING MANUAL].

Irving's pro-§ 10(j) philosophy eliminated a bottleneck; though the Board routinely approved previous General Counsels' requests for § 10(j) authorization, regional directors' requests for § 10(j) authorization were denied by the General Counsel's office 90% of the time. See Siegel, *supra* note 6, at 461.

⁵³ See note 4 *supra*.

The Development of the NLRB's Section 10(j) Guidelines

The increase in the number of section 10(j) petitions filed in the early 1960's led judges⁵⁴ and labor lawyers⁵⁵ to urge the Board to disclose its criteria for determining which unfair labor practice cases warranted section 10(j) action. The office of the NLRB's General Counsel first responded with a list of factors which "an analysis of past cases" indicated had been "considered" in deciding whether to seek section 10(j) relief.⁵⁶ These factors later were adopted as the Board's "Guidelines for the Utilization of Section 10(j)."⁵⁷ They include "the clarity of the alleged violation; . . . whether the [alleged unfair labor practice] involves the shutdown of important business operations [or] creates special remedy problems so that it would probably be impossible either to restore the *status quo* or effectively dissipate the consequences of the unfair labor practices" and other factors, including "exceptional hardship to the charging party."⁵⁸ These factors represent a fair approximation of the legislative purpose of section 10(j).⁵⁹

Nevertheless, whenever the General Counsel's office has published these factors, it has done so with the qualifications that they "are not all inclusive, nor does the presence of one or more factors . . . require that we institute 10(j) proceedings."⁶⁰ By qualifying its guidelines in this manner, the General Counsel's office has emphasized the discretionary nature of the Board's authority to seek injunctive relief under section 10(j).⁶¹

⁵⁴ See, e.g., *McLeod v. General Elec. Co.*, 257 F. Supp. 690 (S.D.N.Y.), *rev'd*, 366 F.2d 847 (2d Cir. 1966), *vacated & remanded*, 385 U.S. 533 (1967).

It seems desirable—it would surely be helpful—for the Board, after nearly twenty years of work with Section 10(j), to formulate and state in some form more authoritative than random speeches by members the criteria by which it determines whether to proceed under this Section. Such a formulation would guide the public, the courts, the agency itself, and give a measure of assurance that the action taken in individual cases is reasonably principled.

257 F. Supp. at 708 n.14 (Frankel, J.).

⁵⁵ See, e.g., Siegel, *supra* note 6, at 461 n.35 (describing author's struggle with then NLRB Chairman Miller to obtain a copy of unreleased portions of Board's § 10(j) criteria).

⁵⁶ *General Study into the Procedures of the NLRB and Its Administration of the Labor-Management Relations Act of 1947, as Amended: Hearings Before the Subcomm. on National Labor Relations Board of the House Comm. on Education and Labor* (pt. 2), 87th Cong., 1st Sess. 1234-37 (1961) (statement of Stuart Rothman, General Counsel, NLRB). These hearings were the source for the PUCINSKI REPORT, *supra* note 7.

⁵⁷ CASE HANDLING MANUAL, *supra* note 52, ¶ 3103.

⁵⁸ *Id.*

⁵⁹ The Guidelines are a praiseworthy attempt to give substance to the Board's discretionary authority to seek § 10(j) injunctions. The NLRB was left by the Taft-Hartley Congress to be guided by its informed discretion as to when it would seek § 10(j) injunctions. See notes 44-48 & accompanying text *supra*.

⁶⁰ CASE HANDLING MANUAL, *supra* note 52, ¶ 3103.

⁶¹ "It should be kept in mind that [§ 10(j)] relief is discretionary, not mandatory." *Id.*

*The NLRB's Exercise of Its Discretionary Section 10(j)
Authority In Discriminatory Discharge Cases*

An analysis of the Board's section 10(j) practice in discriminatory discharge cases⁶² reveals that the Board is arbitrary in its selection of section 8(a)(3) cases for section 10(j) action. All but a few of the reported section 10(j) cases involving section 8(a)(3) complaints filed during fiscal years 1977 through 1979⁶³ can be matched with equally meritorious section 8(a)(3) cases⁶⁴ from the same period⁶⁵ with comparable factual circumstances⁶⁶ where the Board did not invoke section 10(j).⁶⁷

⁶² Review of the Board's § 10(j)—§ 8(a)(3) practice is appropriate because of the ineffectiveness of normal Board procedures in remedying § 8(a)(3) violations, *see* note 13 *supra*, and because advocates of increased § 10(j) use have singled out § 8(a)(3) cases as especially suited for § 10(j) action. *See* COX PANEL REPORT, *supra* note 7, at 12, 26; PUCINSKI REPORT, *supra* note 7, at 51-52; Bok, *supra* note 6, at 130-31; Siegel, *supra* note 6, at 466, 480-81; Note, *supra* note 1, at 572.

⁶³ In fiscal year 1977 (beginning October 1, 1976) there were 22 § 10(j) petitions filed involving § 8(a)(3) violations. 42 NLRB ANN. REP. 311 table 20 (1977). There were 30 such petitions filed in fiscal year 1978. 43 NLRB ANN. REP. 283 table 20 (1978). By June 30, 1979, of fiscal year 1979 there had been 61 § 10(j) petitions of all kinds filed, Irving, *supra* note 4, at 15,953, of which 53 appear to have involved § 8(a)(3) complaints. *Id.* app. B (on file with the *Indiana Law Journal*).

In 20% of the cases where § 10(j) petitions are filed, the charged party agrees to settle the § 10(j) portion of the case. *Id.* at 19,942. Other district court decisions in § 10(j) cases have not been reported. Thus, of the 105 § 10(j)-§ 8(a)(3) authorizations by the Board during the period studied, 74 have been reported in enough detail to determine the factual circumstances of the cases involved. Those cases include: *Barbour v. Central Cartage, Inc.*, 583 F.2d 335 (7th Cir. 1978); *Gottfried v. Mayco Plastics, Inc.*, 472 F. Supp. 1161 (E.D. Mich. 1979); *Fuchs v. Hood Indus., Inc.*, 471 F. Supp. 186 (D. Mass. 1979); *Levine v. C & W Mining Co.*, 465 F. Supp. 690 (N.D. Ohio 1979); *DeProspero v. House of Good Samaritan*, 102 L.R.R.M. 2154 (N.D.N.Y. 1978); *Humphrey v. United Credit Bureau of America*, 99 L.R.R.M. 3459 (D. Md. 1978); *Taylor v. Circo Resorts, Inc.*, 458 F. Supp. 152 (D. Nev. 1978); *Siegel v. Marina City Co.*, 428 F. Supp. 1090 (C.D. Cal. 1977); *Crain v. Fabsteel Co.*, 427 F. Supp. 316 (W.D. La. 1977); *Leventhal v. Car-Riv Corp.*, 96 L.R.R.M. 2899 (E.D. Pa. 1977); *Seeler v. Williams*, 97 L.R.R.M. 2764 (N.D.N.Y. 1977). The remaining cases are collected in Irving, *supra* note 4, app. B (on file with the *Indiana Law Journal*).

⁶⁴ There have been at least 186 § 8(a)(3) cases filed during fiscal years 1977 to 1979 and decided by the Board. *See* NLRB, CLASSIFIED INDEX OF NATIONAL LABOR RELATIONS BOARD DECISIONS AND RELATED COURT DECISIONS ch. 524, § 5073-2200, at 499-511 (Jan. 1977—Dec. 1979) [hereinafter cited as NLRB INDEX]. In 178 of those 186 cases, the Board found a § 8(a)(3) violation. *Id.* Cases in which the complaint was filed before October 1, 1976, were not counted in compiling these figures.

⁶⁵ It is necessary to compare administrative decisions from the same period to eliminate the possibility that inconsistency in those decisions represents a shift in administrative policy. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 587 (abridged student ed. 1965).

⁶⁶ Of course, no two cases are identical in every detail:

[C]ases are seldom identical, particularly in complex areas of administration where by hypothesis there are so many variables. To test whether the difference among a group of cases is "significant" and thus justifies differing results (in the court's judgment), how many cases must one compare and how far back is one entitled or required to go?

Id. However, the reasons for the "differing results" in the Board's choices of § 8(a)(3) cases

This inconsistency is a consequence of the regional NLRB office procedures for processing unfair labor practice cases that are identified as potentially meriting section 10(j) action. The *NLRB Case Handling Manual* instructs regional Board staff to initiate the procedures for obtaining authorization for filing a section 10(j) petition "immediately upon receipt of a request from a party for 10(j) relief, or whenever the Regional Director believes that such relief is necessary."⁶⁸ In most cases, however, only a charging party's request for section 10(j) relief will cause the pre-complaint investigation of an unfair labor practice charge to be expedited in order to determine if action is warranted.⁶⁹ Routine pre-complaint investigations fail to uncover charges which merit section 10(j) relief until so much time has elapsed since the violation occurred⁷⁰ that regional attorneys are reluctant to attempt to convince a district court that the "extraordinary remedy" of injunctive relief is necessary.⁷¹ Thus, other factors among the Board's section 10(j) guidelines being relatively equal, whether a charging party requests injunctive relief appears to determine whether the Board even considers most section 8(a)(3) cases for section 10(j) action.⁷²

A significant exception to this practice occurs, however, when the charging party alleges that a large number of employees have been discharged during a union organizing campaign. In such cases it appears that regional Board officials either expedite the pre-complaint investigation on their own initiative or institute section 10(j) proceedings despite the delay caused by customary pre-complaint investigation.⁷³ Section

for § 10(j) injunctions, see notes 68-72 & accompanying text *infra*, suggest that it is the Board's § 10(j) procedures, and not subtle differences in cases discernible only to the NLRB, which cause these inconsistencies.

⁶⁸ Compare *Fuchs v. Hood Indus., Inc.*, 471 F. Supp. 186 (D. Mass. 1979) (six employees discharged during organizing campaign, § 10(j) relief sought), and *Barbour v. Central Cartage, Inc.*, Civ. No. 77-C-1631 (N.D. Ill. 1977), *vacated as moot*, 583 F.2d 335 (7th Cir. 1978) (two employees discharged during organizing campaign, § 10(j) relief sought), with *Servair, Inc.*, 236 N.L.R.B. 1278 (1979) (16 employees discharged during organizing campaign, § 10(j) relief not sought), and *Winter Garden, Inc.*, 235 N.L.R.B. 4 (1978) (organizing campaign, 12 employees discharged, § 10(j) relief not sought).

⁶⁹ CASE HANDLING MANUAL, *supra* note 52, ¶ 3102.

⁷⁰ Pre-complaint investigation is expedited whenever § 10(j) action is either requested by a charging party or is deemed advisable by the official investigating the change. Interview with Ralph Tremain, Deputy Regional Attorney, NLRB, District 23, in Indianapolis, Indiana (Oct. 23, 1979).

⁷¹ In fiscal year 1977, it normally took a regional NLRB office 48 days to complete its pre-complaint investigation. Nolan & Lehr, *supra* note 2, at 50.

⁷² Interview with Ralph Tremain, *supra* note 69.

⁷³ For a discussion of what the NLRB must prove before a § 10(j) injunction will be granted by the district court, see text accompanying notes 127-34 *infra*.

⁷⁴ See, e.g., *Gottfried v. Mayco Plastics, Inc.*, 472 F. Supp. 1161 (E.D. Mich. 1979); *Crain v. Fabsteel Co.*, 427 F. Supp. 316 (W.D. La. 1977); *Leventhal v. Car-Riv Corp.*, 96 L.R.R.M. 2899 (E.D. Pa. 1977).

10(j) relief was sought in every case involving a mass discharge during an organizing campaign in fiscal years 1977 through 1979.⁷⁴

*The Board's Section 10(j) Practice in Section 8(a)(3) Cases:
An Abuse of Discretion*

Congress' intention that the NLRB, through the exercise of its informed discretion, choose for section 10(j) action those unfair labor practices which cannot adequately be remedied through routine Board procedures is frustrated by the Board's practice of filing section 10(j) petitions in section 8(a)(3) cases only in the event of a "blockbuster"⁷⁵ violation or when the charging party requests section 10(j) relief. By failing to consider the factors outlined in its own guidelines, the Board has eliminated any value those guidelines might have in assuring that its selection of cases for section 10(j) action is "reasonably principled."⁷⁶ This arbitrary practice raises the question of whether the Board has abused the discretion granted to it under section 10(j) by failing to consider other discriminatory discharge cases for injunctive action.

Abuse of discretion has been defined as "an exercise of discretion in which a relevant consideration has been given an exaggerated, [or] 'unreasonable' weight at the expense of others Discretion implies a 'balancing'; where the result is eccentric, either there has not been a balancing, or a hidden and mayhap improper motive has been at work."⁷⁷ The eccentric results in the type of section 8(a)(3) cases chosen for section 10(j) action clearly reflect the exaggerated weight that a charging party's request for section 10(j) relief has been given at the expense of the other important factors listed in the Board's section 10(j) guidelines.

Judicial Limitations on Abuse of Discretion by the NLRB

Although the Board has "broad discretion to fashion and issue . . . relief adequate to achieve the ends, and effectuate the policies, of the

⁷⁴ Hence there were no mass discharge cases listed in the NLRB INDEX, *supra* note 64, in which the Board had not sought a § 10(j) injunction.

⁷⁵ Former General Counsel Irving used this term in denying that the Board seeks § 10(j) relief only in cases where there have been flagrant and unusual violations. Speech of former NLRB General Counsel John S. Irving, Remedies Under the LMRA: An Update, at The Thirty-Second National Conference on Labor, New York University (June 13, 1978), reprinted in 4 LAB. L. REP. (CCH) ¶ 9198 (1978).

Irving's denial is only technically true. The Board's inconsistent record in "average" § 8(a)(3) cases suggests that the NLRB seeks § 10(j) relief of its own volition only in "blockbuster" cases.

⁷⁶ *McCleod v. General Elec. Co.*, 257 F. Supp. 690, 708 n.14 (S.D.N.Y.), *rev'd*, 366 F.2d 847 (2d Cir. 1966), *vacated & remanded*, 385 U.S. 533 (1967).

⁷⁷ L. JAFFE, *supra* note 65, at 586.

[NLRA],⁷⁸ its remedial discretion is not unlimited. Among the numerous cases in which it has circumscribed the Board's exercise of its remedial discretion,⁷⁹ the Supreme Court held in *Detroit Edison Co. v. NLRB*⁸⁰ that "the rule of deference of the Board's choice of remedy does not constitute a blank check for arbitrary action."⁸¹ Reviewing the exercise of discretionary authority in other contexts, the Court has also held that an administrative agency cannot fail or decline to exercise the discretion granted to it by Congress⁸² and that such discretion should not be exercised by applying a predetermined policy which precludes consideration of the facts of each case.⁸³

Thus, the Supreme Court has held that an administrative agency

⁷⁸ *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 176 (1973). See also *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). Though *Golden State* and *Phelps Dodge* are cases involving the Board's remedial powers under § 10(c) of the NLRA, the Board also has broad discretion regarding whether to seek § 10(j) relief. See *McCleod v. General Elec. Co.*, 257 F. Supp. 690, 708 n.14 (S.D.N.Y.), *rev'd* 366 F.2d 847 (2d Cir. 1966), *vacated & remanded*, 385 U.S. 533 (1967).

⁷⁹ See, e.g., *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970) (Board cannot order remedy which is contrary to NLRA's policy favoring collective bargaining); *Local 60, United Bhd. of Carpenters v. NLRB*, 365 U.S. 651 (1961) (Board cannot order confiscatory remedy); *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940) (Board cannot order remedies intended only to deter future violations of NLRA).

⁸⁰ 440 U.S. 301 (1979).

⁸¹ *Id.* at 316. The Court had previously reversed an ICC order because it was inconsistent with contemporaneous decisions, *Barrett Line v. United States*, 326 U.S. 179 (1945), but upheld an FCC decision despite such inconsistency, *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946).

For a review of the heated debate among legal scholars as to whether discretionary decisions by administrative agencies are ever reviewable by the courts, see Berger, *Administrative Arbitrariness—A Synthesis*, 78 YALE L.J. 965 (1969). When, however, as in the present case, abuse results from an agency's failure to exercise its discretion, the Court has not hesitated to reverse the agency's inconsistent decision and remand the case to the agency for proper consideration. See, e.g., *Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

⁸² See *Accardi v. Shaughnessy*, 347 U.S. 260 (1954). In *Accardi*, the United States Board of Immigration Appeals refused to consider whether to suspend a deportation order of an alien, contrary to a regulation which required it to make such a consideration. The Court relied in part on the presence of the regulation, holding that it was as much law as the statute under which it was made and therefore must be applied.

Since the NLRB has been permitted to formulate its regulations by adjudication rather than by rulemaking, see *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969), it may "be given greater freedom by the courts, to ignore or depart from those rules in specific instances without giving sufficient reasons," Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 951 (1965). But cf. *NLRB v. Don Juan Co.*, 178 F.2d 625 (2d Cir. 1949) (though NLRB is free to depart from rules announced in prior cases, inadvertant or unexplained departures will not be sustained), *aff'd after remand*, 185 F.2d 393 (2d Cir. 1950).

⁸³ *Mastrapasqua v. Shaughnessy*, 180 F.2d 999 (2d Cir. 1950) (improper for Board of Immigration Appeals to deny suspension of deportation order on ground that applicant was one of class of aliens to which suspension had in past been denied); accord, *NLRB v. Pittsburgh Plate Glass Co.*, 270 F.2d 167, 174 (4th Cir. 1954) (Board decision held arbitrary and discriminatory because announced policy was followed instead of circumstances of case being studied when it determined appropriate bargaining unit should exclude craft workers).

abuses its discretion if it omits a remedy that has been applied in similar cases, declines to exercise a specific grant of discretion or applies a predetermined policy to cases which prevents it from evaluating the facts of each case. Failing to invoke section 10(j) unless the charging party so requests means that the Board must inevitably be omitting a remedy for identical complaints which merely fail to refer to section 10(j). In the majority of discriminatory discharge cases, where there is no request for injunctive relief, the NLRB fails to exercise the discretion granted it in section 10(j).⁸⁴ By concentrating on blockbuster cases, the Board is applying a predetermined policy which prevents it from considering other cases for injunctive relief. The Board's practice in these cases is thus of the type proscribed by the Supreme Court decisions involving arbitrary action by administrative agencies.

A Scenario for Judicial Intervention

Under the Mandamus and Venue Act of 1962,⁸⁵ an unlawfully discharged employee could petition a federal district court for an injunction ordering the Board to evaluate his section 8(a)(3) complaint for possible section 10(j) action.⁸⁶ Certification of such a suit as a class action would prevent the suit from becoming moot if the named plaintiff's section 8(a)(3) complaint were either considered for section 10(j) action or disposed of on its merits.⁸⁷ Such a class action could seek an injunction ordering the NLRB to reform its section 10(j) procedures so that every section 8(a)(3) case is considered for possible section 10(j) action.⁸⁸

⁸⁴ Cf. *Robesky v. Qantas Empire Airways, Ltd.*, 573 F.2d 1082, 1091-92 (9th Cir. 1978) (Kennedy, J., concurring) ("The standard of review . . . seems to me to require the kind of scrutiny we use whenever we review a determination by an individual or body entrusted with discretionary power. We inquire whether the discretion granted has been abused by a failure to make a reasoned decision.").

⁸⁵ 28 U.S.C. § 1361 (1976).

⁸⁶ See *White v. Mathews*, 559 F.2d 852 (2d Cir. 1977) (jurisdiction predicated on 28 U.S.C. § 1361 upheld in suit to require the Social Security Administration (SSA) to conduct its proceedings with reasonable speed), *cert. denied*, 435 U.S. 908 (1978); *Frost v. Weinberger*, 515 F.2d 57 (2d Cir. 1975), *cert. denied*, 424 U.S. 958 (1976) (jurisdiction under 28 U.S.C. § 1361 upheld in suit to require SSA to provide an evidentiary hearing concerning termination of survivor's benefits). See generally *Byse & Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308 (1967).

⁸⁷ See *Sosna v. Iowa*, 419 U.S. 393, 397-401 (1975) (class action challenging Iowa's one year residence requirement for instituting divorce suit held not moot for class of persons plaintiff had been certified to represent, though case would have become moot if plaintiff had sued only on her own behalf because year had long since expired and she had obtained a divorce elsewhere). For further discussions of mootness, *White v. Mathews*, 559 F.2d 852, 856-58 (2d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978), and *Frost v. Weinberger*, 515 F.2d 57, 62-65 (2d Cir. 1975), *cert. denied*, 424 U.S. 958 (1976).

⁸⁸ Such broad injunctive relief has been ordered against federal agencies which have "consciously and expressly adopted . . . a general policy which is in effect an abdication of its statutory duty." *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (per curiam)

Discretionary Immunity

The Board could not protect itself from such judicial review of its section 10(j) procedures by relying on the fact that its authority to bring section 10(j) actions is discretionary.⁸⁹ In *Nader v. Saxbe*,⁹⁰ the District of Columbia Circuit Court of Appeals considered the proper role of judicial review of prosecutorial discretion. The plaintiff had brought an action under the Mandamus Act to compel the Attorney General and the United States Attorney's Office "to exercise their discretion to initiate prosecutions" ⁹¹ against violators of the Federal Corrupt Practices Act of 1925.⁹² The district court had dismissed the plaintiff's complaint on the grounds that the exercise of prosecutorial discretion is immune from judicial review, or, alternatively, that by declining to bring any prosecutions under the Act, the defendants had exercised their discretion.⁹³ The appellate court rejected both of these bases for the lower court's action by

(en banc). *Adams* was a class action suit to compel HEW to enforce Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976), in 17 states. The district court had ordered the agency to begin enforcing Title VI in those states within two months. *Adams v. Richardson*, 356 F. Supp. 92, 95 (D.D.C. 1973). Subsequently, the court set schedules for HEW to follow in acting on all Title VI complaints when it became clear that the agency was not enforcing Title VI with respect to school districts not covered by the previous order. *Adams v. Weinberger*, 391 F. Supp. 269 (D.D.C.) *modified sub. nom.* *Adams v. Mathews*, No. 3095-70 (D.D.C. July 17, 1975).

See also *Hoffmann-LaRoche, Inc. v. Weinberger*, 425 F. Supp. 890, 894 (D.D.C. 1975) (FDA enjoined from allowing new drugs to be marketed without an approved new drug application); text accompanying notes 102-04 *infra*.

⁸⁹ The argument that enforcement actions of administrative agencies fall within the "agency discretion exception" to the general rule that agency action is reviewable under the Administrative Procedure Act, 5 U.S.C. § 701(a)(2) (1976), has been repeatedly rejected by the courts. See, e.g., *Adams v. Richardson*, 480 F.2d 1159, 1161-62 (D.C. Cir. 1973) (*per curiam*) (en banc), *motion for further relief granted sub nom.* *Adams v. Weinberger*, 391 F. Supp. 269 (D.D.C. 1975), *modified sub nom.* *Adams v. Mathews*, No. 3095-70 (D.D.C. July 17, 1975). The exception is a narrow one. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971); *Barlow v. Collins*, 397 U.S. 159, 166-67 (1970). "[O]nly upon a showing of 'clear and convincing evidence' " that Congress intended to preclude judicial review should the courts defer completely to the agency. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967).

Congress did not intend the NLRB's discretionary authority to seek injunctions to be nonreviewable. Though the General Counsel's office is responsible for filing § 10(j) actions, the statute gives the Board the power to seek § 10(j) injunctions. The Board exercises its statutory authority by requiring the General Counsel's office to obtain approval of each proposed § 10(j) suit. See Memorandum Describing the Authority and Assigned Responsibilities of the General Counsel of the NLRB, 20 FED. REG. 2175 (1955); NLRB CASE HANDLING MANUAL, *supra* note 52, ¶ 3102. The Board's authority to seek § 10(j) relief is clearly distinguishable from the General Counsel's "final authority" to issue unfair labor practice complaints, see 29 U.S.C. § 153(d) (1976), which has been held nonreviewable, see, e.g., *Tensing v. NLRB*, 519 F.2d 365 (6th Cir. 1975); *Terminal Freight Coop. Ass'n v. NLRB*, 447 F.2d 1099, 1101-02 (3d Cir. 1971), *cert. denied*, 409 U.S. 1003 (1972).

⁹⁰ 497 F.2d 676 (D.C. Cir. 1974).

⁹¹ *Id.* at 677.

⁹² Ch. 368, tit. III, 43 Stat. 1070 (1925) (repealed 1971).

⁹³ See 497 F.2d at 678-79.

distinguishing "the essentially Executive function of deciding whether a particular alleged violator should be prosecuted" from the "conventionally judicial determination of whether certain fixed policies . . . lie outside the constitutional and statutory limits of 'prosecutorial discretion.'" ⁹⁴ Other courts have similarly declined to defer unquestioningly to agencies' discretionary decisions on whether to take prosecutorial action. ⁹⁵ Judge Tamm's often quoted ⁹⁶ statement in *Medical Committee for Human Rights v. SEC* ⁹⁷ is representative of the judicial attitude towards the argument that even arbitrary enforcement decisions are nonreviewable: "The decisions of this court have never allowed the phrase 'prosecutorial discretion' to be treated as a magical incantation which automatically provides a shield for arbitrariness." ⁹⁸

Limited Resources Excuse

An attempt by the NLRB to justify the exercise of its section 10(j) discretion in only a limited number of cases because its limited resources will not allow more thorough section 10(j) review procedures should not satisfy an intervening court either. Attempts by other administrative agencies to justify nonenforcement of their statutory mandates because of limited appropriations have been rejected by courts hearing mandamus actions filed by plaintiffs prejudiced by the agencies' inaction. ⁹⁹

For example, the court in *Adams v. Califano* ¹⁰⁰ directed the Department of Health, Education and Welfare (HEW) to take all necessary

⁹⁴ *Id.* at 679.

⁹⁵ *See, e.g., Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (per curiam) (en banc), *motion for further relief granted sub nom. Adams v. Weinberger*, 391 F. Supp. 269 (D.D.C. 1975), *modified sub nom. Adams v. Mathews*, No. 3095-70 (D.D.C. July 17, 1975); *NAACP v. Levi*, 418 F. Supp. 1109 (D.D.C. 1976) (motion to dismiss denied when plaintiff claimed FBI and U.S. Attorney's Office abused discretion by failing to conduct thorough investigation).

⁹⁶ *See, e.g., Nader v. Saxbe*, 497 F.2d 676, 680 n.19 (D.C. Cir. 1974); *NAACP v. Levi*, 418 F. Supp. 1109, 1116 (D.D.C. 1976).

⁹⁷ 432 F.2d 659 (D.C. Cir. 1970).

⁹⁸ *Id.* at 673.

⁹⁹ Two examples are *White v. Mathews*, 559 F.2d 852 (2d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978), *see text accompanying notes 102-04 infra*, and *Hoffman-LaRoche, Inc. v. Weinberger*, 425 F. Supp. 890, 894 (D.D.C. 1975) ("[T]he argument that the FDA lacks the administrative resources to insure compliance . . . cannot be permitted. . ."). *See also Note, Judicial Control of Systemic Inadequacies in Federal Administrative Enforcement*, 88 YALE L.J. 407, 421 (1978) (suggesting: "[S]ome judicial role is possible even when the agency enforcement effort is optimal and the inadequacy is due solely to real limitations on available resources. In such cases a court order may be useful in giving administrators greater leverage in effectively requesting funds needed for adequate enforcement.").

Administrative costs have also been rejected as a defense for violating constitutional rights. *See, e.g., Frontiero v. Richardson*, 411 U.S. 677, 688-91 (1973); *Stanley v. Illinois*, 405 U.S. 645, 656 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 633-38 (1969).

¹⁰⁰ No. 3095-70 (D.D.C. Oct. 26, 1977).

steps to obtain sufficient resources from Congress to fund HEW's enforcement duties under Title VI of the Civil Rights Act of 1964.¹⁰¹ In *White v. Mathews*,¹⁰² HEW was ordered either to expedite the processing of appeals of applicants who had been denied Social Security disability benefits or to begin making prospective payments to those applicants whose appeals were not heard within a judicially prescribed time framework.¹⁰³ The court recognized that its order would tax HEW's resources, but it deemed the statutory right to timely appeals important enough to justify the imposition of those costs.¹⁰⁴

Reforms to Eliminate the Board's Arbitrary Section 10(j) Practices

The Board could eliminate the inconsistent results of its current use of section 10(j) in section 8(a)(3) cases by ending its reliance on charging party requests for section 10(j) relief to trigger consideration of a case for possible section 10(j) action. While the NLRB's limited resources may prevent it from instituting section 10(j) action in every section 8(a)(3) case where it would be useful, uniform application of the section 10(j) guidelines¹⁰⁵ should result in certain types of discriminatory discharge cases being consistently chosen for section 10(j) injunctive proceedings.¹⁰⁶ Consistent choices of certain types of section 8(a)(3) violations would signal to employees that their statutory rights will be swiftly vindicated through injunctive action by the Board. Consistent application of section 10(j) would also provide a deterrent against many employer violations which the current haphazard use of section 10(j) does not provide.¹⁰⁷

¹⁰¹ 42 U.S.C. § 2000d (1976).

¹⁰² 559 F.2d 852 (2d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978).

¹⁰³ 559 F.2d at 858-61.

¹⁰⁴ *Id.* at 859.

¹⁰⁵ See text accompanying notes 57-58 *supra*.

¹⁰⁶ For example, all discriminatory discharge cases during organizational campaigns "create special remedy problems" within the meaning of the guidelines, see CASE HANDLING MANUAL, *supra* note 52, ¶ 3102, since the organizational campaign will long be over before reinstatement can be ordered through the Board's routine investigation, adjudication and enforcement procedures.

¹⁰⁷ The deterrent effects of § 10(j) injunctions were recognized by Chairman Frank McCulloch in 1962: "It is the experienced expectation of the Board that violations of the act can be deterred by indicating a readiness to seek injunctive relief when the incentive to resist unfair labor practices charges rests on advantage of time and delay." McCulloch, *New Problems in the Administration of the Labor-Management Relations Act: The Taft-Hartley Injunction*, 16 Sw. L.J. 82, 99 (1962). But McCulloch was only a reluctant convert to increased § 10(j) use, announcing that the Board would seek more § 10(j) injunctions only after the Pucinski Committee urged him to make this reform. See Comment, *supra* note 4, at 1034-36.

JUDICIAL STANDARDS FOR DETERMINING WHEN SECTION 10(j) RELIEF IS APPROPRIATE

Just as section 10(j) fails to give the NLRB any statutory criteria for determining when its relief should be sought,¹⁰⁸ the section also fails to provide the courts with a standard for determining when section 10(j) relief should be granted.¹⁰⁹ Like the Board, the courts have developed standards for deciding when section 10(j) injunctions are proper. Unlike the Board, however, the courts have not developed uniform standards,¹¹⁰ and those endorsed by several of the circuit courts of appeals are demonstrably inappropriate.

The Development of Conflicting Section 10(j) Standards

From 1948 to 1962, when section 10(j) petitions were rarely filed by the NLRB,¹¹¹ federal district courts granted section 10(j) relief if the Board demonstrated that there was "reasonable cause to believe" that an unfair labor practice had been committed.¹¹² During this period, judges in effect deferred to the Board on the question of the propriety of section 10(j) relief. Since the early 1960's, when the Board began to seek section 10(j) relief more frequently,¹¹³ judges have continued to require a showing that there is reasonable cause to believe the NLRA has been violated,¹¹⁴ but the courts have also imposed additional re-

¹⁰⁸ See note 3 *supra*.

¹⁰⁹ Section 10(j) states only that the court has "jurisdiction to grant the Board such temporary relief or restraining order as it deems just and proper." 29 U.S.C. § 160(j) (1976). For the full text of that section, see note 3 *supra*.

¹¹⁰ The Supreme Court has noted that there are conflicting § 10(j) standards among the courts of appeals but has not had an opportunity to decide which are appropriate. In *McCleod v. General Elec. Co.*, 87 S. Ct. 5 (1966) (Harlan, J.) (mem.) Justice Harlan granted a stay of the Second Circuit's judgment, 366 F.2d 847 (2d Cir. 1966), which had set aside the district court's § 10(j) order to General Electric to bargain with a multi-union bargaining committee: "The underlying issue in this case—the standards governing the application of § 10(j)—has not heretofore been passed upon by this Court and is of continuing importance in the proper administration of the Labor Act." 87 S. Ct. at 6.

After the Supreme Court granted certiorari in *McCleod*, the parties reached agreement on the terms of a new contract. The Court therefore remanded the case to the district court to determine whether the issue was moot. 385 U.S. 533 (1967).

¹¹¹ See note 4 *supra*.

¹¹² See, e.g., *Johnston v. Evans*, 223 F. Supp. 766, 769 (E.D.N.C. 1963) ("This court, to determine whether injunctive relief is warranted, needs [*sic*] only find that the Regional Director has reasonable cause to believe that an unfair labor practice has been committed."); accord, *Alpert v. Trailways, Inc.*, 51 Lab. Cas. 33,202 (D. Mass. 1965); *Getreau v. Gas Appliance Supply Corp.*, 58 L.R.R.M. 2189 (S.D. Ohio 1963); *Boire v. Tiffany Tile Corp.*, 47 Lab. Cas. 28,959 (M.D. Fla. 1963); *Fusco v. Kaase Baking Co.*, 205 F. Supp. 465 (N.D. Ohio 1962); *Kennedy v. Telecomputing*, 43 Lab. Cas. 25,630 (S.D. Cal. 1961).

¹¹³ See note 4 *supra*.

¹¹⁴ The two leading cases on the question of judicial standards for § 10(j) relief, *Angle v. Sacks*, 382 F.2d 655 (10th Cir. 1967), and *McCleod v. General Elec. Co.*, 366 F.2d 847 (2d Cir.

quirements that the Board must satisfy in order to show that injunctive relief is just and proper.¹¹⁵ The courts' initial reassertion of equitable discretion in deciding whether to issue section 10(j) injunctions was in accord with the settled judicial attitude toward administrative agency petitions for injunctive relief.¹¹⁶ The just and proper standards later developed by some courts, however, violate established principles governing the equitable discretion of courts deciding such petitions.

*The Judiciary's Proper Role in Deciding Statutorily Authorized
Petitions for Injunctive Relief*

In *Hecht Co. v. Bowles*,¹¹⁷ the Supreme Court outlined the scope of an equity court's discretion when ruling on an administrative agency's petition for a preliminary injunction which is authorized in the act the agency is charged with enforcing. *Hecht* involved a petition for an injunction by the Administrator of the Emergency Price Control Act of 1942¹¹⁸ to enjoin illegal practices of a retailer. Despite the statutory imperative that upon a showing of illegality the court "shall" issue an injunction,¹¹⁹ the Supreme Court held that the lower court retained its equitable power to deny injunctive relief in the face of the Administrator's undisputed showing of illegal practices.¹²⁰ The Court also held, however, that the trial court's "discretion . . . must be exercised in the light of the large objectives of the Act. For the standards of public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief in these cases."¹²¹

The Supreme Court's holding that the policies of the authorizing act should govern a court's decision whether to grant petitions for injunctions by administrative agencies has been followed by several courts hearing petitions for injunctive relief from various agencies.¹²² Several federal statutes besides the NLRA provide for the issuance of temporary injunctions or other interlocutory relief before a decision on the merits by either an agency or a court.¹²³ Temporary relief has been

1966), *vacated & remanded*, 385 U.S. 533 (1967), adopt conflicting standards, *see* text accompanying notes 127-29 *infra*, but both retain the "reasonable cause" requirement.

¹¹⁵ *See* text accompanying notes 126-29 *infra*.

¹¹⁶ *See* notes 117-20 & accompanying text *infra*.

¹¹⁷ 321 U.S. 321 (1944).

¹¹⁸ Ch. 26, 56 Stat. 23 (1942) (repealed 1946).

¹¹⁹ Section 205(a) of the Act stated that the Administrator "may make application to the appropriate court for an order enjoining [a violation of the Act], or for an order enforcing compliance." *Id.* § 205(a), 56 Stat. 32.

¹²⁰ 321 U.S. at 331.

¹²¹ *Id.*

¹²² *See, e.g., SEC v. Torr*, 87 F.2d 446 (2d Cir. 1937); *United States v. Chrysler Corp.*, 232 F. Supp. 651 (D.N.J. 1964); *SEC v. General Security Co.*, 216 F. Supp. 350 (S.D.N.Y. 1963).

¹²³ *See, e.g.,* 15 U.S.C. § 4 (1976); *id.* § 25; *id.* § 53; *id.* § 70f; *id.* § 77t(b); *id.* § 79r(f); *id.* § 687c(a); 16 *id.* § 825m(a); 29 *id.* § 217; *id.* § 308(f); 42 *id.* § 1971(c); *id.* § 2280; *id.* § 2000a-3(a).

issued under these statutes by courts which have applied their equitable discretion in a way which demonstrates that they recognize their role as enforcers of the congressional policies underlying these acts.¹²⁴

The legislative history of sections 10(j) and 10(l) of the LMRA demonstrates that the courts were to play a similar role as enforcers of the national labor laws.¹²⁵ The jurisdiction to issue injunctions in labor disputes which was reinvested in the federal courts by sections 10(j) and 10(l) cast the equitable discretion of these courts in a form different from that which they exercise in hearing petitions for equitable relief by private litigants. The courts were assigned the limited duty of assuring effective enforcement of Board remedies for both the new union unfair labor practices which were to be enjoined under section 10(l) and the unfair labor practices defined by section 8(a) of the NLRA, which the Board may seek to enjoin under section 10(j).

*Current Judicial Standards for Determining Whether Section 10(j)
Relief is Just and Proper*

Despite the legislative history and settled judicial standards to guide the courts in the exercise of their equitable discretion in section 10(j) suits, several courts of appeals have endorsed "just and proper standards" that are variants of the centuries-old standards used in deciding petitions for temporary injunctions by *private* litigants.¹²⁶ The NLRB has been required to demonstrate, in addition to a reasonable cause showing, that the case is of "an extraordinary nature"¹²⁷ or that a section 10(j) injunction is necessary to "preserve the status quo"¹²⁸ or to

¹²⁴ In *SEC v. May*, 134 F. Supp. 247 (S.D.N.Y. 1955), the district court issued a preliminary injunction against a corporation which had failed to meet SEC requirements regarding the solicitation of proxies for a stockholders' meeting:

[Section 20(b) of the Securities Act of 1933] gives the District Courts power to enjoin, pursuant to complaint by the Commission, acts or practices which constitute or will constitute a violation of the Securities and Exchange Act. . . .

The equity jurisdiction conferred by the statute embraces all power necessary to enforce effectively the provisions of the Securities Acts.

Id. at 258.

In *FTC v. Rhodes Pharmacal Co.*, 191 F.2d 744 (7th Cir. 1951), the appellate court reversed a district court's denial of injunctive relief sought under § 13(a) of the Federal Trade Commission Act, 15 U.S.C. § 53(a) (1976). The court reaffirmed an earlier holding that § 13(a) "was a necessary part of the plan to prevent fraud and fraudulent commerce through fraudulent advertisements, and was written for the purpose of preventing the ineffectuality of proceedings before the Commission." 191 F.2d at 747. *See also* *SEC v. Capital Gains Bureau*, 375 U.S. 180 (1963) (publication of scalping practices); *SEC v. O'Hara Re-election Comm.*, 28 F. Supp. 523 (D. Mass. 1939) (cancellation of proxies).

¹²⁵ *See* notes 19, 40-48 & accompanying text *supra*.

¹²⁶ For a review of those standards, *see Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 997-1026 (1965).

¹²⁷ *E.g.*, *Minnesota Mining & Mfg. Co. v. Meter*, 385 F.2d 265, 270 (8th Cir. 1967).

¹²⁸ *E.g.*, *Seeler v. Trading Port, Inc.*, 517 F.2d 33, 38 (2d Cir. 1975); *McCleod v. General*

"prevent irreparable harm."¹²⁹ Despite the Supreme Court's holding in *Hecht Co. v. Bowles*¹³⁰ that such private injunction standards are inappropriate in weighing administrative agency petitions for injunctive relief,¹³¹ these standards have been applied, often in combination, to erect an insurmountable obstacle to the attainment of section 10(j) relief. As a consequence, section 10(j) injunctions have been denied in cases where they could have served as a means of assuring effective enforcement of NLRA policies.

In *Minnesota Mining & Manufacturing Co. v. Meter*,¹³² the Eighth Circuit reversed a section 10(j) order which required that the company bargain with a multi-employer negotiating committee, stating that "§ 10(j) is reserved for a more serious and extraordinary set of circumstances."¹³³ Almost two years later, after the Board had heard and decided the case on its merits, the same court enforced the Board's order that the company negotiate with the expanded committee.¹³⁴ The district court's refusal to issue a section 10(j) injunction had allowed the company to accomplish its unlawful objective of refusing to bargain with the employees' chosen representatives for two years.

Similarly, the district courts in *Mack v. Air Express International*¹³⁵ and *Crain v. Fabsteel*¹³⁶ refused to order employers to reinstate unlawfully discharged employees because the status quo could not be restored without forcing the employer to discharge employees hired to replace the discriminatees. These courts reasoned that temporary frustration of the discharged employees' rights was preferable to requiring the discharge of the present employees.¹³⁷ The courts' analysis in these cases was misdirected because of their reluctance to alter the status quo and their fear that they might cause irreparable harm to the employer and the replacement employees while trying to prevent the union and its supporters from suffering such damage.¹³⁸ Labor disputes, however, unlike commercial transactions that may be involved in private

Elec. Co., 366 F.2d 847, 850 (2d Cir. 1966), *vacated & remanded*, as moot 385 U.S. 533 (1967); *Crain v. Fabsteel Co.*, 427 F. Supp. 316, 318 (W.D. La. 1977).

¹²⁹ *E.g.*, *McCleod v. General Elec. Co.*, 366 F.2d 847, 850 (2d Cir. 1966), *vacated & remanded*, 385 U.S. 533 (1967); *Johnston v. J.P. Stevens & Co.*, 341 F.2d 891, 892 (4th Cir. 1965); *Fuchs v. Steel-Fab, Inc.*, 356 F. Supp. 385 (D. Mass. 1973); *Kaynard v. Laurence Rigging, Inc.*, 80 L.R.R.M. 2600 (E.D.N.Y. 1972).

¹³⁰ 321 U.S. 321 (1944).

¹³¹ See text accompanying notes 117-21 *supra*.

¹³² 385 F.2d 265 (8th Cir. 1967).

¹³³ *Id.* at 270.

¹³⁴ *Minnesota Mining & Mfg. Co. v. NLRB*, 415 F.2d 174 (8th Cir. 1969).

¹³⁵ 471 F. Supp. 1119 (N.D. Ga. 1979).

¹³⁶ 427 F. Supp. 316 (W.D. La. 1977).

¹³⁷ 471 F. Supp. at 1124; 427 F. Supp. at 318.

¹³⁸ See also *Siegel v. Marina City Co.*, 428 F. Supp. 1090, 1093 (C.D. Cal. 1977) (reinstatement order denied and bargaining order refused where "[a] preliminary injunction could not preserve the status quo").

injunction suits, cannot be frozen in mid-course in order that justice may eventually be done. Judicial intervention in labor disputes inevitably alters the status quo and irreparably disadvantages one party by assisting the other.¹³⁹

Rather than ignoring this historical reality, the Taft-Hartley Congress in section 10(l) sought to take advantage of the status quo altering effects of injunctions by making them mandatory in secondary boycotts and jurisdictional disputes. By requiring the issuance of injunctions against these union unfair labor practices, the congressional majority intended to re-establish equality of bargaining power between management and labor.¹⁴⁰ The discretion to seek injunctions against employer unfair labor practices granted to the NLRB by section 10(j) should also be understood as a grant of authority to alter the status quo. By effectively enforcing the rights guaranteed by the Act in a specific case through the issuance of a section 10(j) injunction, a district court is putting into practice the policy judgments enacted in the NLRA. The Act itself alters the relationship between management and labor.¹⁴¹

If a district court orders an employer to reinstate a wrongfully discharged employee immediately, the court has not simply re-established the status quo that existed before the discharge but rather has demonstrated to the employee, his co-workers and the employer that the employees' rights to organize and bargain collectively¹⁴² will be protected. Timely reinstatement of a discriminatorily discharged employee will, in accordance with the purposes of the NLRA, encourage the exercise of section 7 rights¹⁴³ and thereby alter the relationship between employees and management. On the other hand, if injunctive relief is denied and reinstatement is not ordered until years after a sec-

¹³⁹ This effect of labor injunctions was one of the reasons advanced in 1930 for eliminating them:

In labor cases . . . complicating factors enter. The injunction cannot preserve the so-called status quo; the situation does not remain in equilibrium awaiting judgment upon full knowledge . . . Choice is not between irreparable damage to one side and compensable damage to the other. The law's conundrum is which side should bear the risk of unavoidable irreparable damage.

F. FRANKFURTER & N. GREENE, *supra* note 5, at 201.

¹⁴⁰ See text accompanying notes 29-41 *supra*.

¹⁴¹ The Wagner Act brought to fruition a revolution in national labor policy—worker-employees were to be protected in their rights to organize and bargain collectively through freely chosen representatives. Congress found that the denial of employee rights led to strikes and unrest which seriously interfered with the flow of interstate commerce. The Wagner Act sought socioeconomic reform by use of the traditional American political device of checks and balances. It was an industrial relations "constitution" recognizing and guaranteeing employee rights.

McClintock, *The Unreviewable Power of the General Counsel—Partial Enforcement of the Labor Act*, 12 GONZ. L. REV. 79, 82-83 (1976).

¹⁴² See 29 U.S.C. § 157 (1976).

¹⁴³ *Id.*

tion 8(a)(3) violation, the message conveyed to management and labor is that section 7 rights can be violated with impunity. Whether the district courts should alter the status quo, thereby creating the potential for irreparable damage to one party by protecting the rights of the other, is not a question for the judiciary.¹⁴⁴ In passing sections 10(j) and 10(l) Congress expressed its judgment that the national labor policies enacted in the NLRA and LMRA require that the Board be able to obtain speedy protection of labor and management rights through the use of temporary injunctions.¹⁴⁵

The "Public Interest" Obstacle

Two judicial standards which have evolved under section 10(j) demonstrate an appreciation that Congress, by enacting sections 10(j) and 10(l), was creating a statutory scheme by which the courts and the NLRB were jointly to enforce the federal labor laws. These standards require only that the Board make a reasonable cause showing and that it prove that injunctive relief is in the public interest¹⁴⁶ or is necessary "to prevent frustration of the basic remedial purpose of the act."¹⁴⁷ Derived from interpretations of the legislative purpose of section 10(j),¹⁴⁸

¹⁴⁴ Judicial reluctance to grant § 10(j) injunctions has, however, been widespread: 33 of the 93 petitions for § 10(j) relief from 1974 to 1979 were denied. Irving, *supra* note 4, at 15,943. Of the 60 injunctions issued under the section during the same period, the courts did not always grant the "full extent of the affirmative relief sought by the Board." *Id.* The relief obtained sometimes amounted to only a cease and desist order. *See, e.g., Mack v. Air Express Int'l*, 471 F. Supp. 1119 (N.D. Ga. 1979).

Perhaps this judicial reluctance is based on a misinterpretation of the legislative purpose of § 10(j) or a misapprehension of the appropriate judicial standard for weighing administrative agencies' petitions for injunction relief. The ample legislative history available to guide the courts in their interpretation of the purpose of § 10(j) and the clear standards established for deciding agencies' petitions for injunctions suggest that a more accurate explanation for the federal district courts' antagonism towards § 10(j) may be the fear that judicial petitions will bring an onslaught of injunctive actions. If such apprehension underlies the judiciary's attitude towards § 10(j), it is unfounded. Of the unfair labor practice cases where the Board authorized § 10(j) action from 1974 to 1979, over 45% were settled before the § 10(j) petition was decided by the court. Irving, *supra* note 4, at 15,943.

¹⁴⁵ *See* note 19 *supra*.

¹⁴⁶ *Eisenbert v. Hartz Mountain Corp.*, 519 F.2d 138, 142 (3d Cir. 1975). *See also* *Kaynard v. Steel Fabricators Ass'n*, 95 L.R.R.M. 2015 (S.D.N.Y. 1977); *Squillacote v. UAW Local 578*, 383 F. Supp. 491, 492 (E.D. Wis. 1974) ("The only real interest intended to be protected by 10(j) injunctive proceedings is the public's interest.").

¹⁴⁷ *Squillacote v. Local 248, Meat & Allied Food Workers*, 534 F.2d 735, 744 (7th Cir. 1976). *See also* *Sacks v. Davis & Hemphill, Inc.*, 71 L.R.R.M. 2126 (4th Cir. 1969); *Angle v. Sacks*, 382 F.2d 655, 660-61 (10th Cir. 1967); *Johansen v. Queen Mary Restaurants*, 86 L.R.R.M. 2813 (C.D. Cal. 1974); *Humphrey v. Retired Persons Pharmacy*, 84 L.R.R.M. 2599 (D.D.C. 1973).

¹⁴⁸ *See, e.g., Squillacote v. UAW Local 578*, 383 F. Supp. 491 (E.D. Wis. 1974) (protecting the public interest seen as proper interpretation of legislative intent); *Squillacote v. Local 248, Meat & Allied Food Workers*, 534 F.2d 735 (7th Cir. 1976) (frustration of remedies standard seen as proper interpretation of legislative intent).

these standards follow the requirement stated in *Hecht Co. v. Bowles*¹⁴⁹ that judicial discretion in statutory injunction suits be exercised in light of the policy of the act which provides for the injunction.

Unfortunately, the courts which have applied these standards have not always understood the dual nature of the public interest protected by the NLRA.¹⁵⁰ In an early NLRA case,¹⁵¹ the Supreme Court succinctly summarized the policies of the Act and the means by which those policies are effectuated:

[T]he fundamental policy of the Act is to safeguard the rights of self-organization and collective bargaining, and thus by the promotion of industrial peace to remove obstructions to the free flow of commerce as defined by the Act. . . . [T]he purpose of the Act is to promote peaceful settlements of disputes by *providing legal remedies for the invasion of the employee's rights*.¹⁵²

Unless there are effective remedies for violations of the NLRA, the Act's scheme for assuring industrial peace is unworkable.¹⁵³ The public interest standard should be applied, therefore, so that it reflects what the frustration of remedies test makes explicit—the public's interest in the peaceful resolution of labor disputes can be achieved only through effective protection of employee and management rights guaranteed by the federal labor laws. When the Board petitions for section 10(j) relief, the courts should determine only whether there is reasonable cause to believe that an unfair labor practice has been committed and that injunctive relief is necessary to remedy the violation. More restrictive judicial requirements frustrate the congressional intent underlying section 10(j) and are contrary to established principles for judicial review of administrative agency petitions for statutorily authorized injunctive relief.

CONCLUSION

Section 10(j) was enacted to enable the NLRB to obtain injunctive relief to remedy unfair labor practices which it could not resolve quickly enough through its usual procedures. The Board has failed to develop

¹⁴⁹ 321 U.S. 321 (1944).

¹⁵⁰ See Jaffe, *The Public Right Dogma in Labor Board Cases*, 59 HARV. L. REV. 720 (1946); Comment, *The Charging Party Before the NLRB: A Private Right in the Public Interest*, 32 U. CHI. L. REV. 786 (1965).

¹⁵¹ *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939).

¹⁵² *Id.* at 257-58 (emphasis added). Since the LMRA, the Act serves to protect employers' rights as well. See also *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103 (1970).

¹⁵³ "Remedies are of paramount importance in effectuating the policies of the National Labor Relations Act. It is idle to speak about rights without remedies, for they are the means by which rights conferred by the Act are protected." Irving, *supra* note 52, at 349.

procedures which assure that all section 8(a)(3) cases are reviewed for possible section 10(j) action. Many section 8(a)(3) cases have been arbitrarily left to proceed slowly through the Board's investigative and adjudicatory processes because the Board consistently seeks section 10(j) relief only in extraordinary cases, where the Board's position is enhanced by the "blockbuster" character of the violation, or in cases where the Board can present an "average" section 8(a)(3) case to a court quickly because a charging party's request for section 10(j) relief has triggered expeditious Board action. Moreover, many courts have developed overly restrictive standards for weighing section 10(j) petitions which are inconsistent with the standards governing judicial discretion in statutory injunction suits and which frustrate the purpose of section 10(j).

Inconsistencies in the use of section 10(j) by the NLRB could be mitigated if the Board would review every section 8(a)(3) case for potential section 10(j) action. Application of the Board's guidelines to each case would enable it to initiate section 10(j) proceedings consistently in those cases most in need of quick remedial action. If the courts would then grant section 10(j) relief in such cases, requiring the Board to demonstrate only that there is reasonable cause to believe an unfair labor practice has been committed and that injunctive relief is necessary to remedy the violation, section 10(j) would reinforce the NLRA's scheme for ensuring industrial peace by protecting employee and management rights.

RANDAL L. GAINER

